mission's jurisdiction to permit curtailment of deliveries to resale customers.

In Opinion and Order No. 606, issued October 5, 1971, (Petition App. E, pp. 48a-76a), the Commission held that it had plenary jurisdiction under the Natural Gas Act to accept, approve, or modify United's curtailment plan. The Opinion stated as justification for this holding the Commission's authority to regulate transportation of natural gas in interstate commerce under Section 1(b) of the Natural Gas Act and its authority to prohibit discrimination under Sections 4(b) and 5(a) of the Act. In addition, Opinion No. 606 stated that implementation of United's curtailment plan "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief" under United's contracts with its customers which might be initiated in the courts. (Petition App. E, p. 69a).

On December 3, 1971, in Opinion No. 606-A (Petition App. F, pp. 77a-84a), the Commission denied nine timely petitions for rehearing including one filed by MP&L. MP&L's Petition specifically stated that (1) the Commission erred in finding that it has jurisdiction to allocate gas in a manner inconsistent with direct sales contracts, and (2) that the Commission erred in stating that implemention of United's curtailment plan in a manner consistent with Opinion No. 606 would be an absolute defense for United against all claims for relief under the direct sales contract between United and MP&L.

MP&L and five others have filed timely petitions for review with the United States Court of Appeals for the Fifth Circuit. By order issued January 28, 1972,

four of the six cases, including the one involving MP&L, were consolidated for further proceedings. The other two cases were consolidated with the first four by order issued February 16, 1972.

Besides the proceeding in the Fifth Circuit arising out of Opinion No. 606 (hereinafter called the "curtailment proceeding" for ease of identification), the Commission also is seeking a writ of certiorari in the Petition to review the judgment of the Fifth Circuit in *Louisiana Power & Light Company* v. *United Gas Pipe Line Company, et al.*, No. 71-2550, issued January 14, 1972 (the "judgment proceeding"). MP&L was not a party to the judgment proceeding and, hence, this brief in opposition is limited to the curtailment proceeding. Accompanying the Petition was a Motion for Expedited Consideration ("Motion").

ARGUMENT IN OPPOSITION

A. Certiorari Before Judgment Should Not Be Granted

The Commission has asked this Court to issue a writ of certiorari to the Fifth Circuit not only before judgment but before that court has even had a chance to read the first brief in the proceeding.* The basis for seeking this extraordinary and perhaps unconstitutional remedy is that this curtailment proceeding has a common issue with the judgment case, i.e., the question of the Commission's basic jurisdiction to order curtailments to direct customers of interstate pipeline companies.

Admitting that "this Court's power to issue a writ of certiorari before judgment in cases coming directly to the courts of appeals from administrative agencies

* Initial briefs are due on March 3, 1972.

has never been definitively determined" (Petition, p. 21), the Commission asks this Court to chart a new course with no showing whatsoever of the need for early action on the curtailment case. While emphasizing the need for expedition, the Petition itself gives the impression that such expedition may not really be required in the curtailment case because it still seeks early briefing and argument if only one of the petitions is granted* (Motion, p. 2, Petition, p. 23). There would be no point in expediting briefing and argument in the judgment case if an early determination in that case alone were of no benefit in determining the jurisdiction question.

Returning to the question of whether this Court can, in fact, review the administrative decision prior to judgment in the Fifth Circuit, it appears that this issue never has been squarely ruled upon by this Court. However, the treatise writers have serious doubts about this Court's jurisdiction in such a situation. Stern and Gressman, *Supreme Court Practice*, pp. 28-30 (4th ed., 1969), notes that:

> A possible exception to the Court's power to issue a writ of certiorari before judgment is the class of cases coming to the courts of appeals directly from administrative agencies. In such circumstances it could be said that the Supreme Court, by injecting itself into the case prior to any judicial action by a lower court, would be exercising original jurisdiction outside the constitutional pattern. . . .

Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 132 (2d ed. Wolf-

* It obviously would not be appropriate to grant certiorari in the curtailment case and not in the judgment case.

son & Kurland 1951) has similar doubt as this Court's jurisdiction:

> It has been suggested that the Supreme Court may not have jurisdiction to grant certiorari before judgment to a Court of Appeals where the proceeding originated not in a District Court but in an administrative tribunal. The theory is that in such a case not the appellate, but the constitutionally limited original, jurisdiction of the Supreme Court would be involved.
>
> Certiorari before judgment was granted in *Ickes* v. *Associated Industries* although the case originated in an administrative tribunal; but in that case an order had been entered which the Supreme Court could affirm, reverse or modify. Where there is no such order, the power of the Supreme Court to grant certiorari before judgment in a case originating in the Court of Appeals is far more doubtful. (Footnotes omitted).

The Petition makes no claim that this proceeding is the type of case that can be heard by this Court under its original jurisdiction because it is obvious that under no stretch of the imagination could Article III, Section 2 of the Constitution be interpreted to include this type of proceeding.

The argument is made that "in our view, however, review of an agency decision in a case where the agency has acted in a quasi-judicial capacity is appellate in nature." (p. 22). The only basis given for this assertion is this Court's opinion in *Marbury* v. *Madison*, 1 Cranch 137 (1803). This is a fine old case but it is difficult to see its relevance to the present situation.*

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*We are also asked to "compare" *Wheeler Lumber Bridge & Supply Company* v. *U. S.*, 281 U.S. 572 (1930) but such a comparison reveals that *Wheeler* involved the certification of a question of law from the Court of Claims, not an agency.

The Federal Power Commission is not a court and its creation by the Congress constituted a delegation of its *legislative* powers. A landmark decision on the nature of administrative agencies is *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Describing the Federal Communications Commission as an agency to which Congress had delegated authority "to carry out its legislative authority," this Court's opinion emphasized the difference between a court and an administrative agency, such as the Federal Communications Commission and the Federal Power Commission. In *Pottsville* the Court of Appeals had invoked against the Federal Communications Commission the doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid to rest.

This Court held that the basic issue in the case was the Court of Appeals' failure to recognize the difference between a court and an administrative agency. Noting that "[t]his was not a mandate from court to court but from a court to an administrative agency" (309 U.S. 134, 141), this Court held that "to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes" of administrative agencies and to "disregard the traditional scope" of the courts (309 U.S. 134, 142).

In *Evans* v. *FCC*, 113 F. 2d 166 (1940), the District of Columbia Circuit interpreted the *Pottsville* decision (113 F. 2d 166, 168):

> [T]he foundation of the Pottsville decision is that proceedings before the Commission are *administrative, not judicial in character.* (Emphasis supplied)

From the foregoing, it is apparent that the Commission is asking this Court to undertake a radical assertion of jurisdiction that is at best of questionable constitutional validity. It is suggested that caution in taking such a step should be employed even if there were a compelling need for immediate action by this Court. Such is certainly not the case here. The question of the Commission's curtailment jurisdiction is present in the judgment case. There is no emergency requiring immediate review by this Court of the curtailment case.

The Petition complains that the forthcoming "summer months are critical to the natural gas industry" and that pipelines must be in a position to interrupt direct as well as resale customers so as to inject gas into storage. The Petition fails to note, however, that United has been operating under a curtailment program for over a year.

The curtailment case can have no adverse effect this summer on United or any other pipeline. It is the Commission's holding which is being appealed and as there is no stay of that holding, the Commission can hardly complain that a full consideration by the Fifth Circuit will interfere with United's curtailment program.

Additionally, Section 19 of the Natural Gas Act, which governs appeals, contains no provision for the Commission to appeal its own order. It states simply that:

> (b) Any party to a proceeding under this act *aggrieved by an order issued by the Commission* in such proceeding may obtain a review of such order *in the circuit court of appeals* of the United States for any circuit wherein the natural gas

> company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. (Emphasis supplied)

Since the Commission cannot be aggrieved by its own order, there is no provision in the Natural Gas Act for appeal of Opinion No. 606 by the Commission. Further, the Act specifically provides for appeals of Commission orders by proper parties in *courts of appeals* and does not make any provision for appeal to the Supreme Court. These are fatal defects in the Petition and cannot be cured simply because the Commission thinks the Fifth Circuit may have prejudged its case (Petition, p. 13).

The only issue common to the two proceedings is the Commission's curtailment jurisdiction. The second issue involving Commission certificate jurisdiction over certain of United's facilities is not involved in the curtailment case. In urging this Court to grant a writ of certiorari before judgment in the curtailment case, the Petition states (pp. 12-13):

> Although we are petitioning for writs of certiorari in both the curtailment and [judgment] cases, we believe the issue on which we seek review—i.e., the Commission's ultimate authority over curtailments—is squarely presented in the [judgment] case decided by the court of appeals. Since the court of appeals' decision on the jurisdictional issue in the curtailment case is foreordained by its decision in the [judgment] case, we urge the Court also to grant a writ of certiorari before judgment in the curtailment case so that the

issue of the Commission's jurisdiction will be presented *in the context of a full administrative record.* (Emphasis supplied).

This position seems inconsistent. If, as the Commission asserts, there is a common *issue of law* in both cases, why is there any need for a factual administrative record? If a "full administrative record" is of any significance, why is the Fifth Circuit's decision as to the jurisdictional issue "foreordained by its decision in the [judgment] case"? In other words, if the record could have any effect on a determination of jurisdiction by this Court, why is it that the same record could have no effect on a determination of jurisdiction by the Fifth Circuit?

B. The Writ of Certiorari Should Be Denied Because the Commission Does Not Have Jurisdiction Over Direct Industrial Sales of Interstate Pipelines.

Even if there were no procedural infirmities in the Commission's seeking a writ of certiorari prior to judgment by the Court of Appeals, the writ should not be granted because of its lack of merit.

Direct sales for consumptive use are not subject to the jurisdiction of the Commission and the Commission does not have the power to permit tariff changes by natural gas pipelines in order to authorize them to curtail deliveries to direct customers. Interpretation of the provisions of direct sales contracts dealing with curtailments is a matter for the courts of competent jurisdiction, not the Commission.

The Commission's natural gas jurisdiction is governed by Section 1(b) of the Natural Gas Act which reads:

> The provisions of this Act shall apply to the transportation of natural gas in interstate com-

> merce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but *shall not apply to any other transportation or sale* of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. (Emphasis supplied).

By this language Congress specifically excluded from Commission jurisdiction sales other than sales for resale.

Thus, the Fifth Circuit's decision in the judgment case was based upon the plain language of the Act. In dismissing the argument that it should disregard this plain meaning because of "changed circumstances of a new era," the court stated it was the role of Congress not a court to rewrite the law (Petition App. A, p. 13a):

> In speaking to the effect of new experiences under this very Act and to the identical problem we face, the Supreme Court plainly specified that Congress was the institution vested with the power to adjust the law to correct deficiencies which were not originally anticipated. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 522, 68 S. Ct. 190, 19 L. Ed. 128 (1947).

The rationale of the Fifth Circuit's opinion is that the Commission has no *continuing* certificate jurisdiction over direct sales made by interstate pipeline companies. When a certificate to make such a sale is sought by the pipeline, the Commission may issue or

veto it. Further, its permission must be obtained to abandon the use of the certificated facilities "but between the two functions the express exemption of regulatory power over such consumptive sales bars agency intervention." (Petition App. A, p. 22a). The court explained the legal basis for its holding (18a-19a):

> Not only do we fail to find any precedent for establishing a new type of FPC authority in between its § 7(c) veto power over the initial authorization to begin the use of a facility to transport natural gas in interstate commerce and § 7(b)'s requirement that FPC authorization be obtained for abandonment of such facilities, we find clear authority that no such continuing control over non-jurisdictional sales exists. The rationale of our own decision in *Hunt Oil Company* v. *Federal Power Commission*, 334 F. 2d 474 (5th Cir. 1964), indicates that a certificate has a permanency that is free from continuous FPC adjustment and control. (Footnotes omitted).

The basis for the Fifth Circuit's holding goes back many years and finds support in numerous cases. The Act's limitation of Commission jurisdiction, as set forth in Section 1(b), was explained in the landmark Supreme Court case of *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, at 516-517 (1947):

> This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.

The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply *to any other * * * sale * * *.*" (Emphasis added). Those words plainly mean that the Act shall not apply to any sales other than sales "for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." Direct sales for consumptive use of whatever sort were excluded.

The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed. (Footnote omitted)

The Supreme Court's holding in *Panhandle* in 1947 is as apt today as it was then, and it has since been reaffirmed by the courts and the Commission. *City of Hastings* v. *FPC*, 221 F. 2d 31 (D. C. Cir. 1954), *cert. denied*, 349 U.S. 920 (1955); *Colorado Interstate Gas Co.* v. *FPC*, 185 F. 2d 357 (3d Cir. 1950); *Coastal Transmission Corporation, et al.*, 26 F.P.C. 318 (1961). Clearly, Section 1(b) must be controlling in this proceeding and the Commission lacks jurisdiction to determine United's curtailment policies for direct customers.

Opinion No. 606 based the Commission's jurisdiction on its authority to regulate the *transportation* of natural gas in interstate commerce under Section 1(b)

and under Section 7(c) of the Act,* a certificate section. This argument is not supported by judicial precedent and is inconsistent with the Commission's own actions in unsuccessfully attempting to obtain from Congress jurisdiction over direct industrial sales.

It is recognized that the certification of the facilities constructed to make a nonjurisdictional direct sale must be obtained under Section 7(c). However, Section 7(c) is a *facilities* section of the Act and the facilities involved in the transaction are the facilities of the natural gas pipeline. It is not the sale to a direct customer that is being certificated but changes in or additions to the facilities, or the operation of facilities, of the interstate pipeline.

Obviously, in determining whether or not it will issue a certificate to a pipeline the Commission must consider its effect on the public convenience and necessity under its Section 1 "transportation" authority. *FPC* v. *Transcontinental Gas Pipe Line Corporation,* 365 U.S. 1 (1960). However, the Commission's authority to issue an initial certificate over pipeline facilities does not bestow upon it the right to regulate a direct sale. *A fortiori,* it does not give it continuing authority over such a sale.

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* The pertinent part reads as follows:

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the contruction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . .

In *Granite City Steel Company* v. *FPC*, 320 F. 2d 711 (D. C. Cir. 1963), a case analogous to the present situation (except that it was a Section 7(a) certificate case rather than a curtailment case), a group of resale customers of Mississippi River Fuel Corporation, a natural gas pipeline, sought to have the pipeline's direct industrial customers curtailed and the gas reallocated to them. The court, reversing the Commission, found that the Commission lacked the authority to so reallocate.

In *Colorado Interstate Gas Co.* v. *FPC*, 185 F.2d 357, at 359, 360 (3d Cir. 1950) the court reversed an order by a divided Commission requiring a pipeline to file a "tariff applicable to all natural gas delivered to a buyer, whether or not for resale." The Commission was attempting continuing jurisdiction over a direct sale by means of tariff provisions. The court would not permit it:

> [T]he power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. That being the extent of the authority which Congress has conferred upon the Commission that body is without authority to compel Colorado Interstate to make its gas tariff applicable to any sales other than those for resale. It is beyond the power of the Commission to require a natural gas company within its jurisdiction to make its tariff applicable to sales which are not within the regulatory power of the Commission for this would be in effect to regulate such sales. Indeed, the Commission itself recognized this in 1945 when in accepting Colorado Interstate's earlier tariff changes for filing it specified that they were to be effective only for sales "for resale for ultimate public consumption."

Two other cases in which the courts have indicated the lack of post certicate jurisdiction over direct sales by the Commission are *Panhandle Eastern Pipe Line Company* v. *Michigan Public Service Commission,* 341 U.S. 329 (1951) and *City of Hastings* v. *FPC,* 221 F 2d 31 (D. C. Cir. 1954).

As early as 1963, the Commission, recognizing that it did not have jurisdiction to regulate the rates and terms of direct industrial sales, requested such authorization from Congress:

> At the time the Natural Gas Act was adopted in 1938, it was not believed that Commission *regulation of the rates and terms* of such sales was necessary to protect the purchasers from discrimination or unduly high rates, *or that such sales could have any adverse effect upon jurisdictional sales for resale.* Both of these views have proven to be incorrect in a significant number of situations. Thus, while the Commission is not suggesting that this type of sale is inherently improper or should be generally prohibited—on the contrary, in many situations they have been shown to be mutually beneficial to all interested parties—it is believed that *bringing such sales within the range of Commission regulations would materially enhance the effectiveness of Commission regulation of natural gas in the public interest.* (1963 FPC Annual Report, pp. 4-5). (Emphasis supplied).

The requested legislation never has been granted and the Commission lacks jurisdiction today to regulate "rates and terms" of direct sales even when lack of such jurisdiction could have "adverse effect upon jurisdictional sales for resale." In a letter dated June 12, 1963, from then FPC Chairman Joseph C. Swidler to President of the Senate, Lyndon B. Johnson, trans-

mitting the proposed legislation, he stated (June 19, 1963, *Congressional Record*, p. 11084):

> Under existing law the Commission's authority is limited to sales for resale in interstate commerce; hence, *the price and other terms of a direct sale* by a pipeline to an industrial consumer are outside the sphere of this Commission's regulatory authority. (Emphasis supplied)

The curtailment provisions clearly are "other terms of a direct sale" and as Chairman Swidler correctly observed, "outside the sphere of this Commission's regulatory authority."

From the foregoing it is clear that the Petition contains a number of fatal defects. It is premature, it is an attempt by the Commission to appeal its own Opinion No. 606 and even on the merits the Commission's position on jurisdiction is an erroneous one.

CONCLUSION

WHEREFORE, Mississippi Power & Light Company prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner*
v.
LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents*
(The Collateral Proceeding)

FEDERAL POWER COMMISSION, *Petitioner*
v.
LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents*
(The Curtailment Proceeding)

No. 71-1040

UNITED GAS PIPE LINE CO. and PENNZOIL UNITED, INC., *Petitioners*
v.
LOUISIANA POWER & LIGHT CO., *Respondent*

UNITED GAS PIPE LINE CO., *Petitioner*
v.
LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents*
(FPC Opinion 606)

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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